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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 458.

NATIONAL SECURITIES CORPORATION, Successor by Merger to AMERICAN GAS & ELECTRIC SECURITIES CORPORATION, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF.

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Respondent's primary[1] argument is (Br. 7-8) that sec-

[1] Respondent's suggestion that, apart from section 45, the claimed deduction "is probably not allowable" under *Pennsylvania Indemnity Co.* v. *Commissioner*, 77 F. (2d) 92, is patently untenable. In that case, the parent paid to the subsidiary over $666,000 (that being the subsidiary's cost basis) in cash for securities which were worth only about $420,000. Immediately thereafter (partly on the

tions 112(b)(5) and 113(a)(8) merely prescribe a method of *computation* of gain or loss, and do not provide for *allowance* of the amount so computed; and that we must look to section 45 for determination of the extent to which the loss, so computed, may be allowed.

However, this argument ignores entirely the provisions of section 23. That section provides (emphasis supplied) that "in computing net income there *shall be allowed*" as a deduction, "in the case of a corporation, losses sustained during the taxable year," and that the basis for determining the amount of such losses "to be allowed * * * *shall be*" the basis provided by section 113(b). Section 113(b), as applicable to a situation like ours, provides (by reference to section 113(a)) that the basis "*shall be* the same as it would be in the hands of the transferor." The basis of the transferor here was the cost of $140,378.06.[2]

Section 23 therefore clearly provides that, in the case of property acquired as the subsidiary here acquired the Standard stock, the subsidiary *shall be allowed* as a deduction the excess of the parent's cost over the proceeds of sale by the subsidiary. If section 45 be construed as permitting any variation from this rule, there is an apparent conflict with section 23, and the question is presented as to which section shall govern. Since section 23, read in conjunction with section 113(a)(8), applies specifically to a fact situation like that here presented *and to no other,* whereas section 45 is general in its application, petitioner submits that section 23 must govern, under the well established rule of statutory construction discussed at page 16 of our original brief.

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same date) the parent sold these securities in the market, and claimed the loss on its return. The claim was denied, because the excess above market value as paid by the parent was intended to be and was in fact a capital contribution to the subsidiary and not "cost" of the stock to the parent in the ordinary acceptation of that term. The decision has no bearing on a case where, as in the instant case, the transaction involved is clearly covered by the provisions of sections 23(f) and (h) and 113(a)(8).

[2] Sec. 113(a).

Respondent asserts (Br. 8) that "under the facts of this case it is only reasonable to treat the loss as one which has in fact been sustained by the parent, since allowing the loss to the subsidiary would plainly give an artificial picture of its true net income." This contention, if sound would be equally applicable to every case covered by section 113(a)(8) and therefore amounts to an argument that that section should *never* be given effect, because it gives "an artificial picture" of true net income. We submit that it is for the Congress, and not the Courts, to determine such questions of legislative policy.

We further suggest that, for the reasons stated, the decision of the court below may be so plainly erroneous as to warrant a reversal without argument.

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